A **MAXISEGAR SDN BHD**

v.

VERONICA LEE HA LING & ORS

B COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDULL HAMID EMBONG JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: W-02-125-2005]
C 10 JULY 2009

CONTRACT: *Agreement - Sale and purchase agreement - Standard form agreement under the Housing Developers (Control and Licensing) Regulations 1989 - Vacant possession, reckoning of - Requirements to*
D *constitute effective delivery of vacant possession*

CONTRACT: *Construction of terms of contract - Sale and purchase agreement - Standard form agreement under the Housing Developers (Control and Licensing) Regulations 1989 - Claim for damages for late delivery of vacant possession of property - Reckoning of vacant possession*
E *- Whether issuance of certificate of fitness envisaged vacant possession - Whether parties intended to relate delivery of vacant possession to issuance of certificate of fitness*

CONTRACT: *Damages - Liquidated damages - Claim for liquidated*
F *damages for late delivery of vacant possession of property - Relevant dates for reckoning of liquidated damages - Whether the date next following the completion date to the date of the issuance of the first temporary certificate of fitness*

G This appeal arose out of the High Court's award of damages in a purchasers' claim against a developer for late delivery of vacant possession of certain condominium units. The only issue for determination on appeal concerned how the date of delivery of vacant possession of the property should be assessed. The High
H Court Judge in allowing the purchasers'/respondents' claim had ordered damages to be computed till the date of issuance of the certificate of fitness ('CF') on 19 September 2001. The counsel for the appellant/developer argued that the date of delivery of vacant possession of the property was effective on the date of
I issuance of Form E by the appellant's architect. Counsel for the respondents submitted that the judge had not erred in his

reckoning of vacant possession. The only evidence available to support the delivery of vacant possession of the property was the issuance of the CF, submitted respondents' counsel.

Held (allowing the appeal in part)
Per Sulaiman Daud JCA:

(1) In determining the time of delivery of vacant possession of the property, cll. 20(1) and 20(2) read together with cl. 23 of the sale and purchase agreement ('S & P') – which agreement based on the standard form contract under the Housing Developers (Control and Licensing) Regulations 1989 – were pertinent. From these provisions, the Court of Appeal was unable to agree with the respondents' contention that the issuance of the CF was one of the requirements to be fulfilled for the delivery of vacant possession. The intention of the parties not to relate the delivery of vacant possession to the issuance of the CF could be inferred from the proviso to cl. 23(1) of the S & P which expressly provided that the delivery of vacant possession would not give the purchaser the right of occupation. (paras 8, 9, 10 & 15)

(2) In order to constitute effective delivery of vacant possession, it was sufficient for the appellant to show that it had fulfilled the three requirements provided under cl. 23(1) of the S & P, namely: (i) that its architect had certified in Form E that the construction of the property had been duly completed; (ii) water and electricity supply were ready for connection to the property; and (iii) the appellant had applied for the issuance of the CF from the appropriate authority. The issuance of Form E by the appellant's architect did not constitute sufficient proof that these requirements had been fulfilled. (paras 11 & 13)

(3) For the delivery of vacant possession to be effective the property must be in a state in which it could be occupied upon the issuance of the appropriate CF by the relevant local authority. In the instant case, there were two temporary CF's for occupation of the property. Neither the date of issuance of the Form E, nor the date of issuance of the CF could constitute the date of delivery of vacant possession. Having regard to all the circumstances of the present case, and the justice of the case, the date of issuance of the first temporary CF, *viz.* 25 June 1999, ought to be taken as the date of

delivery of vacant possession. To go beyond that date to the date of the issuance of CF would defeat the expressed intention of both parties as stipulated under cll. 22 and 23 of the S & P. Both the temporary certificate and the CF gave the respondents the right to occupy and enjoy the property in question. Even though the right given under the temporary CF was not permanent, nevertheless in the instant case it had been renewed from time to time till the issuance of the CF. (paras 16, 17 & 18)

(4) The trial judge had erred in the computation of the liquidated damages to the date of the issuance of the CF. It ought to be calculated from the date next following the completion date to the date of the issuance of the first temporary CF of the property, *viz.* on 25 June 1999. (para 19)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini berbangkit dari award ganti rugi Mahkamah Tinggi dalam suatu tuntutan pembeli-pembeli terhadap satu pembangun untuk penghantaran lewat beberapa unit-unit kondominium. Isu tunggal yang perlu ditentukan atas rayuan berhubung dengan bagaimana tarikh penghantaran milikan kosong hartanah itu seharusnya ditaksir. Hakim Mahkamah Tinggi dalam membenarkan tuntutan pembeli-pembeli/responden-responden telah mengarahkan ganti rugi dikira sehingga tarikh pengeluaran sijil kelayakan ('SK') pada 19 September 2001. Peguam untuk perayu/pembangun menghujah bahawa tarikh penghantaran milikan kosong hartanah itu adalah efektif pada tarikh pengeluaran Borang E oleh arkitek perayu. Peguam untuk responden-responden menghujah bahawa hakim tidak khilaf dalam pendapatnya tentang milikan kosong. Keterangan tunggal yang ada untuk menyokong penghantaran milikan kosong hartanah itu adalah pengeluaran SK, menghujah peguam responden-responden.

Diputuskan (membenarkan rayuan sebahagiannya)
Oleh Sulaiman Daud HMR:

(1) Dalam menentukan penghantaran milikan kosong hartanah itu, kll. 20(1) dan 20(2) dibaca bersama-sama dengan kl. 23 perjanjian jual beli ('S&P') – yang perjanjian berdasarkan kontrak bentuk seragam di bawah Peraturan-peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 – adalah penting. Daripada peruntukan-peruntukan ini, Mahkamah

Rayuan tidak bersetuju dengan pendakwaan responden-responden bahawa pengeluaran SK merupakan salah satu dari keperluan untuk dipenuhi bagi penghantaran milikan kosong. Niat pihak-pihak untuk tidak berhubung penghantaran milikan kosong kepada pengeluaran SK boleh diinfer daripada proviso kepada kl. 23(1) S&P yang menyatakan dengan jelas bahawa penghantaran milikan kosong tidak akan memberikan pembeli hak penghunian.

(2) Agar untuk membentuk penghantaran efektif milikan kosong, ia adalah mencukupi bagi perayu membuktikan bahawa ia telah memenuhi ketiga-tiga keperluan-keperluan yang disediakan di bawah kl. 23(1) S&P, iaitu: (i) bahawa arkiteknya telah memperakui dalam Borang E bahawa pembinaan hartanah itu telah disudahkan; (ii) air dan bekalan elektrik sedia untuk disambungkan ke hartanah itu; dan (iii) perayu telah memohon untuk pengeluaran SK daripada pihak berkuasa yang berpatutan. Pengeluaran Borang E oleh arkitek perayu tidak membentuk bukti yang mencukupi bahawa keperluan-keperluan ini telah dipenuhi.

(3) Bagi penghantaran milikan kosong untuk dijadikan efektif hartanah itu mesti berada dalam keadaan di mana ia boleh didiami setelah pengeluaran SK yang berpatutan oleh pihak berkuasa tempatan yang relevan. Dalam kes semasa, terdapat dua SK sementara bagi penghunian hartanah itu. Baik tarikh pengeluaran Borang E itu, mahupun tarikh pengeluaran SK, tidak boleh membentuk tarikh penghantaran milikan kosong. Memandangkan kesemua keadaan dalam kes semasa, dan keadilan kes ini, tarikh pengeluaran SK sementara yang pertama, iaitu 25 Jun 1999, sepatutnya diambil sebagai tarikh penghantaran milikan kosong. Untuk melampaui tarikh itu kepada tarikh pengeluaran SK akan mengalahkan niat nyata kedua-kedua pihak seperti yang disyaratkan di bawah kll. 22 dan 23 S&P. Kedua-dua sijil sementara dan SK memberi responden-responden hak untuk menghuni dan menggunakan hartanah yang berkenaan. Walaupun hak yang diberi di bawah SK sementara itu bukan untuk selama-lamanya, namun begitu dalam kes semasa ia telah dibarui dari masa ke semasa hingga pengeluaran SK.

A **(4)** Hakim perbicaraan telah khilaf dalam pengiraan ganti rugi jumlah tertentu ke tarikh pengeluaran SK. Ia sepatutnya dikira dari tarikh yang seterusnya mengikuti tarikh kesudahan ke tarikh pengeluaran SK sementara pertama hartanah itu, iaitu 25 Jun 1999.

B

For the appellant - Tan Seng Cheong; M/s Ricky Tan & Co
For the respondents - Harpal Singh (K Kirubakaran & Harwindar Kaur with him); M/s AJ Ariffin, Yeo & Harpal

[Appeal from High Court, Kuala Lumpur; Suit No: S4-24-1673-2003]

C

Reported by Andrew Christopher Simon

JUDGMENT

Sulaiman Daud JCA:

D

[1] This is an appeal by the appellant against the decision of the learned judge of the High Court in allowing the respondents' claim for liquidated damages pursuant to a sale and purchase agreement of property. After hearing submissions of counsel, we E allowed the appeal in part. We now give our reasons for the decision.

[2] Briefly, the facts relevant to this appeal are as follows. By a sale and purchase agreement executed between the parties ("the agreement"), the respondents (plaintiffs in the court below) agreed F to purchase from the appellant (defendant in the court below) certain condominium units ("the property") at the prices stipulated therein. The agreement was based on the standard form contract as set out in the Housing Developers (Control and Licensing) Regulations 1989.

G

[3] By cl. 22(1) of the agreement, the appellant agreed to hand over to the respondents 'vacant possession of the property to which water and electricity supply are ready for connection' within thirty-six months from the date of the agreement ("completion H date"). Clause 7 stipulates that time shall be the essence of the contract. Clause 22(2) stipulates, as an express term, that if the appellant failed to hand over vacant possession of the property 'to which water and electricity are ready for connection' before the completion date, the appellant shall pay immediately to the I respondents liquidated damages to be calculated from day to day at the rate of ten per centum per annum of the purchase price.

[4] When the appellant failed to hand over vacant possession of the property within the stipulated period, the respondents filed the present originating summons claiming, among others, liquidated damages in the total sum of RM400,123.12 computed from the day next following the completion date to the date of issuance of certificate of fitness for occupation ("the certificate of fitness"). The learned trial judge made orders in terms of the respondents' claim, and hence the present appeal.

[5] From the submission of learned counsel for both parties, it is apparent to us that the only issue that arose for determination in this appeal is the date of delivery of vacant possession of the property. The learned trial judge in allowing the respondents' claim ordered damages to be computed till the date of issuance of certificate of fitness of the property on 19 September 2001.

[6] It is not disputed that the appellant has failed to deliver vacant possession of the property to the respondents before the completion date. However learned counsel for the appellant contended that the learned trial judge had erred in the computation of the liquidated damages from the completion date to the date of issuance of certificate of fitness. It is his contention that by virtue of cl. 22(1) of the agreement, delivery of vacant possession of the property was effective on the date of issuance of Form E by the appellant's architect certifying that the construction of the property has been duly completed.

[7] Learned counsel for the respondents, on the other hand, maintained that the issuance of Form E alone was not sufficient to prove that all the requirements for the delivery of vacant possession as stipulated under the agreement have been fulfilled. It was further submitted that for the delivery of vacant possession to be effective the property conveyed must be capable of occupation. According to learned counsel the only evidence available to support the delivery of vacant possession of the property was the issuance of the certificate of fitness, and by reason thereof it was contended that the learned trial judge had not erred in his finding.

[8] In determining the time of delivery of vacant possession of the property, we are of the view that cls. 20(1) and 20(2) of the agreement have to be read together with cl. 23 thereof. Clause 23 provides as follows:

23. Manner of Delivery of Vacant Possession

(1) Upon the issuance of a Certificate by the Vendor's Architect certifying that the construction of the said Parcel has been duly completed and water and electricity supply are ready for connection to the said Parcel and the Vendor has applied for the issuance of the Certificate of Fitness for Occupation from the Appropriate Authority and the Purchaser having paid all monies payable under clause 4(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement the Vendor shall let the Purchaser into possession of the said Parcel:

Provided that such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the Certificate of Fitness for occupation for the said building is issued.

(2) Upon the expiry of fourteen (14) days from the date of the Vendor requesting the Purchaser to take possession of the said Parcel, whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession.

[9] The procedure of obtaining certificate of fitness is provided in cl. 25 of the agreement which reads as follows:

25. Vendor To Obtain Certificate of Fitness For Occupation

The Vendor shall, pursuant to the application for the Certificate of Fitness for Occupation under Clause 23(1), at its own cost and expense, duly comply with all the requirements of the Appropriate Authority which are necessary for the issuance of the Certificate of Fitness in respect of the said Building.

[10] From the aforesaid provisions, we are unable to agree with learned counsel for the respondents that the issuance of certificate of fitness is one of the requirements to be fulfilled for the delivery of vacant possession within the meaning of cls. 22 and 23 of the agreement. The intention of the parties not to relate the delivery of vacant possession to the issuance of certificate fitness can be inferred from the proviso to cl. 23(1) which expressly provides that the delivery of vacant possession shall not give the purchaser the right of occupation.

[11] In our view, to constitute an effective delivery of vacant possession, it shall be sufficient for the appellant, as the vendor, to show that it has fulfilled the three requirements set out in cl. 23(1), that is to say, firstly, its architect had certified in Form E that the construction of the property has been duly completed; secondly, water and electricity supply are ready for connection to the property; and thirdly, the vendor has applied for the issuance of the certificate of fitness from the appropriate authority in accordance with by-law 25(1) of the Selangor Uniform Building By-laws 1986 ("the By-laws"), being the By-laws applicable thereto.

[12] With regard to the first requirement, the appellant relied on the affidavit sworn by the architect in charge of the project to the effect that the certificate in Form E has been forwarded to the relevant local authority for the issuance of the certificate of fitness. The said Form E which was dated 2 February 1999 was also exhibited by the appellant as exh. "YYF1". Learned counsel for the respondents however argued that the said Form E was not relevant as it was not made in the prescribed form, and that there was no endorsement of its receipt by the relevant local authority. With respect, we disagree. The positive assertion made by the architect on the submission of Form E to the relevant local authority was not contradicted. Further, we are satisfied that it was made in the prescribed form and was issued in compliance with by-law 25(1) of the By-laws. In addition, no challenge was made on its authenticity.

[13] With regard to the second and third requirements, we agree with learned counsel for the respondents that the issuance of Form E by the architect did not constitute sufficient proof that these requirements have been fulfilled. The procedure of the issuance of Form E is regulated by the By-laws, and there is no requirement therein to have the water and electricity supply ready for connection at the time of issuance of the said certificate. Similarly by-law 25, which regulates the procedure of application of certificate of fitness, requires the application to be supported by the necessary documents to show that all the essential services, including access roads, landscape, car parks, drains, water and electricity installation, as the case may be, have been installed. In the present case, apart from the said Form E, no other documents were exhibited to support the making of such an application.

[14] What is then the effective date of the delivery of vacant possession herein? Learned counsel for the respondents submitted that in the absence of any evidence to show that all the three requirements aforesaid have been satisfied at the time of issuance of Form E, then the date of issuance of certificate of fitness should be taken as the delivery date. It is contended that until such time, the respondents have no right to occupy or enjoy the said property.

[15] With respect, we are unable to agree with him. To recapitulate, it is expressly provided in the proviso to cl. 23(1) of the agreement that that delivery of vacant possession shall not give the purchaser the right to occupy the property in question. As such, the right of occupation is not one of the factors to be considered in determining the time of delivery of vacant possession under the agreement.

[16] Nonetheless, we agree that for the delivery of vacant possession to be effective the property must be in a state in which it could be occupied upon the issuance of the appropriate certificate of fitness by the relevant local authority. In this respect, it is to be recalled that in the course of submission before us, we were referred by learned counsel for the appellant to two temporary certificates of fitness for occupation ("temporary certificate of fitness") of the property which were exhibited in the respondents' supporting affidavit. The first certificate was dated 25 June 1999 and valid for a period of six months from 19 February 1999 to 18 August 1999. The second certificate which was dated 25 June 1999 was also for a period of six months from 20 December 1999 to 19 June 2000. In addition, there was the evidence led by the appellant to the effect that the first temporary certificate of fitness was granted one month after the issuance of the letter of delivery of vacant possession to the respondents, and that the same had been renewed from time to time until the grant of the permanent certificate of fitness.

[17] The temporary certificate of fitness was issued pursuant to by-law 26(1) of the By-laws which empowers the relevant local authority in its discretion to grant such certificate for a period not exceeding six months in cases where only minor deviation from the approved building plan had been made and pending full compliance with the requirements of the local authority before the issuance of certificate of fitness for occupation.

[18] Having ruled out the date of issuance of Form E, or the date of issuance of certificate of fitness, as the relevant date of delivery of vacant possession, and having regard to all the circumstances of the present case, we deem it fit for the justice of the case to take the date of issuance of the first temporary certificate of fitness, as the date of delivery of vacant possession herein. In our view to go beyond that date to the date of the issuance of certificate of fitness would defeat the expressed intention of both parties as stipulated in cls. 22 and 23 of the agreement. We observed that both the temporary certificate and the certificate of fitness gave the respondents the right to occupy and enjoy the property in question. Even though the right given under the temporary certificate of fitness is not permanent but in the present case it has been renewed from time to time till the issuance of the certificate of fitness.

[19] For the reasons afore said, we are of the view that the learned trial judge had erred in the computation of the liquidated damages to the date of the issuance of the certificate of fitness. In our view, it should be calculated from the date next following the completion date to the date of the issuance of the first temporary certificate of fitness of the property, ie, on 25 June 1999.

[20] In conclusion, we unanimously allowed the appeal in part. The order of the High Court in so far as it relates to the computation of the liquidated damages were set aside and substituted with the computation as alluded above. Each party shall bear its own costs.